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SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-235

MARCO DE FUNIS, *et al.*,

Petitioners,

vs.

CHARLES ODEGAARD, *et al.*,

Respondents.

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*, AND ANNEXED BRIEF, OF COMMITTEE ON ACADEMIC NONDISCRMINATION AND INTEGRITY

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The undersigned, as counsel for the above-named organization, respectfully move this Court for leave to file the accompanying brief *Amicus Curiae.*

The Committee on Academic Nondiscrimination and Integrity is a national association of university, graduate school, and professional school professors and administrators who have joined together to further equality of opportunity in university employment and admissions. They firmly believe that all persons must be equal before the law, and in the selection procedures of colleges, universities, and

other institutions of higher learning with respect to employment and admission of students. The Committee is also concerned with protecting academic standards against degradation from any source that would lower the quality of American intellectual life.

The Committee believes that the outcome of this case will directly and substantially advance or retard efforts to make sure that invidious discrimination is eliminated from American higher education. On the basis of its experience in combatting such discrimination, it seeks to submit to this Court the reasons why it believes that the judgment below should be reversed.

The annexed brief notes that the discrimination caused by the unconstitutional perversion of the affirmative action concept in student admissions is depriving many Americans of their right to equal protection of the law. It argues that past discrimination against one group cannot be redressed by present discrimination against others.

Because of the rapidly approaching date for oral argument in this case, we have not sought the consent of the parties to the filing of a brief *Amicus Curiae*. We ask that the Court accept the delayed filing of this brief, in the interests of justice.

Respectfully submitted,

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February, 1974

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Opinions Below

The opinions of the Supreme Court of Washington are reported at 82 Wn. 2d 11, 507 P. 2d 1169, and are reprinted as Appendix A to the Petitioner's Jurisdictional Statement or in the Alternative Petition for Certiorari.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3). Certiorari was granted on 19 November 1973.

Questions Presented

The questions presented in this case are two:

1. May a state establish racial quotas for the admission of students to its law school?

2. May a state, which cannot constitutionally discriminate on racial grounds against black applicants to its law school, constitutionally discriminate on racial grounds against white applicants to its law school?

Constitutional Provision

The Fourteenth Amendment to the Constitution of the United States provides:

> "• • • nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Interest of the *Amicus Curiae*

The Committee on Academic Nondiscrimination and Integrity (CANI) is a nationwide group formed in early 1972 by faculty members from American colleges and universities, both state and private. They were alarmed by the development of certain administrative and other practices related to university admissions and employment which they felt were in direct opposition to the letter and spirit of the 1964 Civil Rights Act and to the equal protection provisions of the United States Constitution. CANI is an

offshoot from the University Centers for Rational Alternatives, an organization of concerned scholars and teachers which from its inception in 1968 worked through its members and chapters towards the reestablishment of tranquility on American campuses, the strengthening of rational discourse as the best method of education, and in support of academic freedom which was then under attack by partisans of intolerant political orthodoxies.

During its comparatively brief existence, the Committee on Academic Nondiscrimination and Integrity has succeeded in uniting a representative cross-section of faculty members from colleges and universities all across the country. It brought together professionals from every discipline, women and men, blacks and whites, Jews and Gentiles, renowned academics with many years of tenure and young graduates entering academic life. This fundamental diversity is well reflected in the composition of CANI's Steering Subcommittee, which consists of:

Arthur Bestor, University of Washington
Bruno Bettelheim, University of Chicago
Joseph Bishop, Yale Law School
Daniel Boorstin, Smithsonian Institution
R. C. Buck, University of Wisconsin
Robert F. Byrnes, Indiana University
Nicholas Capaldi, CUNY, Queens
Paula Sutter Fichtner, Brooklyn College
Nathan Glazer, Harvard University
Oscar Handlin, Harvard University
George Hildebrand, Cornell University
Gertrude Himmelfarb, CUNY, Brooklyn
Jack Hirschleifer, UCLA
Sidney Hook, Hoover Institution
Erich Isaac, CUNY, CCNY

Rael J. Isaac, CUNY, Brooklyn
Paul Kurtz, SUNY, Buffalo
Abba Lerner, CUNY, Queens
Daniel Lerner, MIT
Seymour M. Lipset, Harvard University
Fritz Machlup, Princeton University
Ernest Nagel, Columbia University
Norma L. Newmark, CUNY, Lehman College
Eugene Rostow, Yale Law School
Paul Seabury, University of California, Berkeley
John Searle, University of California, Berkeley
Malcolm Sherman, SUNY, Albany
Philip Siegelman, San Francisco S. U.
Thomas Sowell, UCLA
Abraham Tauber, Yeshiva University
Miro M. Todorovich, CUNY, Bronx Community College
L. Pearce Williams, Cornell University
Jacob Wolfowitz, University of Illinois
Cyril Zebot, Georgetown University

Through its extended academic network of members and friends, CANI first gathered information on cases involving so-called reverse discrimination against qualified applicants for academic positions and university admissions. Many of these cases then served as the basis for complaints by other allied civic and civil rights organizations. The accumulated evidence served subsequently for the analysis of trends and the formulation of positions which CANI advanced during its presentations to the Secretary of Labor, the officials of the Labor Department's Office of Federal Contract Compliance, the Secretary of the Department of Health, Education, and Welfare, the Office for Civil Rights of the Department of Health, Education, and Welfare, and the officials of the Executive Office

of the President. Representations were also made at several regional offices of the Office for Civil Rights and local university administrations. Factual materials have also been put at the disposal of interested members of Congress. The Committee is helping members of the academic community who are seeking redress against discrimination.

During its inquiries and studies, the Committee on Academic Nondiscrimination and Integrity has repeatedly encountered the rapidly spreading practice of administrative imposition of overt or covert racial quotas in both admissions and the hiring and promotion of instructors at institutions of higher education. In case upon case, despite the claim of benign intent and allegiance to principles of nondiscrimination, persons whose achievements led them to believe that they would be given the opportunity to acquire further skill or knowledge or to use their scholarly abilities, found themselves discriminated against for no other reason than their race or sex.

The question of the constitutionality of the establishment of racial quotas for admission to institutions of higher education is of vital importance to members of the Committee, not only because the decision will affect the quality of the students they teach, and thus also the quality of future scholars, but because it bears directly and obviously on the constitutionality of the establishment of racial quotas in the hiring and promotion of instructors in such institutions.

Statement

The statement of the facts of the case in the brief *Amicus Curiae* of the Anti-Defamation League of B'nai B'rith is correct and satisfactory and we hereby adopt it.

Summary of Argument

The decision of the Supreme Court of Washington, holding constitutional the use of racial quotas to determine eligibility for admission to the Law School of the University of Washington, is inconsistent with the general doctrine that state action which discriminates on the basis of race is presumptively a denial of the equal protection of the laws and with the specific holding of this Court that the exclusion of an applicant for admission to a state university solely on the basis of race is a violation of the Fourteenth Amendment. The record shows no "compelling state interests" that justify resort to a method of compensation for educational disadvantages which is so drastic and so inherently objectionable.

Argument

This Court has squarely held that the exclusion of an applicant from a state university solely on the basis of race violates the Fourteenth Amendment. *Sweatt* v. *Painter*, 339 U.S. 629 (1950); *cf. Brown* v. *Board of Education*, 347 U.S. 483 (1954). To argue that De Funis was not excluded from the University of Washington Law School because of race is sophistry. It is undisputed that he would have been admitted if all applicants for admission had been scrutinized according to the same criteria, or if he had been a member of one of the racial groups for whom admission quotas had been established. The Court's holding in *Sweatt* v. *Painter, supra*, is in essence an application of the broader principle that the imposition of a racial

classification by an agency of the state is presumptively invalid under the Fourteenth Amendment. *Loving* v. *Virginia*, 388 U.S. 1, 10 (1967); *McLaughlin* v. *Florida*, 379 U.S. 184, 191-92 (1964).

"Distinctions between citizens solely by reason of their ancestry are by their very nature odious." *Hirabayashi* v. *United States*, 320 U.S. 81, 100 (1943). There may perhaps be very extraordinary circumstances, as that case rather unhappily demonstrates, in which discrimination on the basis of race might be constitutionally permissible. See Rostow, "The Japanese-American Cases—a Disaster," 54 *Yale Law Journal* 489, 1945. In any event, whatever authority that decision had, even for times of war, was qualified if not repudiated, by *Duncan* v. *Kahanamoku*, 327 U.S. 304 (1946). Manifestly, if it is unconstitutional to try civilians before military courts in times of war when the civil courts are open, it would seem *a fortiori* unconstitutional to imprison civilians and to restrict their freedom to travel or to live where they choose, without even a miliary trial on the basis of Presidential action pursuant to a statute. It would be difficult to imagine a clearer case of attainder. *United States* v. *Brown*, 381 U.S. 437 (1965). The interference with normal civil rights in *Duncan* is far less drastic than state action based on race.

The desire, however well-intentioned, to benefit one race at the expense of another is not the kind of circumstance which could make the reasoning of *Hirabayashi* applicable. The mechanical admission or exclusion of students (or faculty) purely on the basis of race can benefit neither education nor scholarship. It is more than doubtful that it benefits those for whose supposed advantage racial quotas

are established. See *e.g.*, *Sowell*, BLACK EDUCATION, MYTHS AND TRAGEDIES, 202 (1972). The cure for poison is not an injection of more poison.

There are many methods, short of the "inherently odious" practice of admitting or excluding applicants by reason of their ancestry, of compensating those who have been deprived of educational opportunity. The Committee on Academic Nondiscrimination and Integrity favors maximum efforts by the state to assure all potentially qualified members of all races an opportunity to acquire legal and other education. It favors special efforts to prepare the disadvantaged for fair competition, so that they can fully participate in every activity of our society on the basis of equal opportunity. It favors an increase in the total number of places in institutions of higher learning. It favors the use of flexible policies, which may consider such individual qualities as social or ethnic background as *one* factor in the selection of applicants. Of course, such policies must be implemented on a nondiscriminatory basis since race or ethnicity are not evidence of economic, social or cultural deprivation. But, by the same token, the Committee cannot support admission or exclusion on the basis of arbitrary racial quotas, such as were employed by the Law School of the University of Washington.

Under the Respondents' theory of this case they have the burden of proving (1) that an overriding state interest justifies and indeed requires a quota for certain groups defined by race; and (2) that no feasible alternative procedures are available for assisting prospective law students from "culturally disadvantaged" homes, whether their parents are white, black, Indian, Asiatic or Mexican-Amer-

ican. The Respondents have not presented convincing factual testimony on either of these points. The record is devoid of evidence that the Respondents have exhausted or even attempted other methods for assuring equal educational opportunities to members of the racial groups in whose favor the quotas were established.

The Committee does not believe that a "Brandeis Brief," based on the full array of the relevant social science data, would support the Respondents' contention here.

But the fact—and technically the decisive fact in this case—is that no such effort has been made. The Court is being asked to legitimize a racial quota on the basis of vague and general opinion testimony, assumed to invoke social facts of common knowledge. In essence, the Respondents are asking this Court to take judicial notice of the compelling power of their major premise. Questions of the Fourteenth Amendment and other legal authorities aside, that premise—the contention that some racial quotas are benign, and should be condoned—is one of the most difficult and controversial questions in social and behavioral science research. This Court should not consider that contention on the basis of the record in this case.

The modern jurisprudence of the Fourteenth Amendment is a proud page in our national history, and one of the great achievements of this Court. Its magisterial force should not be qualified by an affirmance of the judgment below, which would constitute a precedent at least as dangerous, and far more pervasive in its impact, than *Hirabayashi* v. *United States* itself.

In general, the Committee concurs in and adopts the arguments contained in the brief of the Anti-Defamation League of B'nai B'rith as *Amicus Curiae.*

Conclusion

The judgment below is clearly inconsistent with the Equal Protection Clause of the Fourteenth Amendment and should be reversed, on the minimal ground that the Respondents have not met the burden of proof called for by their theory of the case and on the broader and more fundamental ground that the practices established in the record constitute a violation of petitioner's right to the equal protection of the laws.

Respectfully submitted,

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